

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Applications of)	
)	
Sirius Satellite Radio Inc.)	MB Docket No. 07-57
)	
And)	
)	
XM Satellite Radio Holdings Inc.)	
)	
For Approval to Transfer Control)	
)	

PROTECTIVE ORDER

Adopted: November 16, 2007

Released: November 16, 2007

By the Chief, Media Bureau:

1. On July 11, 2007, the Media Bureau (the “Bureau”) issued a Protective Order (the “First Protective Order”) regarding confidential or proprietary documents that have been or may be submitted by Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”), collectively referred to as “the Applicants,” and others that have or may become parties to this proceeding (individually, each is a “Submitting Party,” and collectively the “Submitting Parties”).¹ For the reasons set forth below, we hereby adopt a further Protective Order (the “Second Protective Order”) to ensure that certain highly confidential and competitively sensitive documents and information that may be submitted by the Submitting Parties are afforded adequate protection.

2. On November 2, 2007, the Bureau issued an initial request for information to the Applicants.² On November 7, 2007, the Applicants stated that there are certain documents and information responsive to the Bureau’s request which constitute some of their most sensitive business data, the release of which would place the Applicants at a significant competitive disadvantage.³ Applicants supplemented this letter on November 9, 2007.⁴ For material specified in these letters, the Applicants seek additional

¹ Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., Protective Order, DA 07-3135 (rel. July 11, 2007) (“First Protective Order”).

² Letters from Monica Shah Desai, Chief, Media Bureau, to Richard E. Wiley, Robert L. Pettit, Peter D. Shields, and Jennifer D. Hindin (Sirius), and to Gary M. Epstein, James H. Barker and Brian W. Murray (XM), MB Docket 07-57, (filed November 2, 2007).

³ Letter from Richard E. Wiley and Gary M. Epstein to Monica Shah Desai, Chief, Media Bureau, MB Docket No. 07-57 (filed November 7, 2007) (“November 7 Letter”).

⁴ Letter from Richard E. Wiley and Gary M. Epstein to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-18 (filed November 9, 2007) (“November 9 Letter”).

protection beyond the First Protective Order. Specifically, Applicants seek enhanced protection for certain categories of materials related to their operational and financial data, contracts, programming and merger agreements, marketing and pricing strategies, and sensitive technical data and trade secrets.⁵ Generally, the Applicants represent that the information requested is proprietary and highly sensitive, and is routinely protected from disclosure to third parties. The Applicants state that disclosure of this information would reveal Applicants' specific strengths, weaknesses, and strategies; they fear that if competitors obtained the information, they would be able to exploit perceived weaknesses to gain an unfair competitive advantage, causing significant harm to the Applicants' businesses. Applicants also note that access to cost data by competitors could lead to tacit collusive behavior.

3. The Commission will grant more limited access to those materials which, if released to competitors, would allow those competitors to gain a significant advantage in the marketplace.⁶ Accordingly, we will permit persons submitting such documents and information and those of a similarly competitively sensitive nature to designate those materials as Highly Confidential and, as provided below, we will limit access to such materials to Outside Counsel of Record, their employees, and Outside Consultants and experts whom they retain to assist them in this proceeding. We find that such materials are necessary to develop a more complete record on which to base the Commission's decision in this proceeding and therefore require their production. We are mindful of their highly sensitive nature, but we must also protect the right of the public to participate in this proceeding in a meaningful way. We conclude that the protections adopted in this Second Protective Order will give appropriate access to the public while protecting a Submitting Party's competitively sensitive information, and will thereby serve the public interest. The Second Protective Order covers only those documents or data (or portions thereof) that are responsive to the document requests listed in paragraph 6 below and contain Highly Confidential Information. To the extent narrative responses or documents are responsive to requests listed in paragraph 6 and do not contain Highly Confidential Information, they are to be produced in unredacted format or under the First Protective Order.

4. *Acknowledgement.* Any party seeking access to confidential documents subject to the Second Protective Order shall request access pursuant to the terms of the Second Protective Order and must sign the Acknowledgement of Confidentiality, attached as Appendix A ("Acknowledgement").

5. *Definitions.* As used herein, capitalized terms not otherwise defined in this Second Protective Order shall have the following meanings:

"Stamped Highly Confidential Document" means any document, or any part thereof, that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN MB DOCKET NO. 07-57 before the Federal Communications Commission," unless the Commission determines, *sua sponte* or by request pursuant to Sections 0.459 or 0.461 of its rules, that any such document is not entitled to such confidential treatment. The term "Document" means any written, recorded, electronically stored, or graphic material, whether produced or

⁵ November 7 Letter at 1-3; November 9 Letter at 1-3.

⁶ See, e.g., *News Corporation, The DIRECTV Group, Inc., and Liberty Media Corporation, Application for Authority to Transfer Control*, MB Docket 07-18, Order, DA 07-3106 (rel. July 10, 2007) (adopting a second protective order); *Adelphia Communications Corp., Time Warner Cable Inc. and Comcast Corp., Applications for Consent to the Assignment and/or Transfer of Control*, MB Docket No. 05-192, Order, DA 05-3226 (rel. December 21, 2005) (adopting a second protective order); *News Corporation, General Motors Corporation, and Hughes Electronic Corporation*, MB Docket No. 03-124, Order, DA 03-2376 (rel. July 22, 2003) (adopting a second protective order).

created by the Submitting Party or another person. By designating a document a “Stamped Highly Confidential Document,” a Submitting Party signifies and represents that it contains information that the Submitting Party believes should be subject to protection under FOIA, the Commission’s implementing rules and this Second Protective Order.

“Highly Confidential Information” means information contained in Stamped Highly Confidential Documents or derived therefrom that is not otherwise available from public sources and that the Submitting Party has kept strictly confidential. Specifically, the responses requested by the Initial Information Request in Docket No. 07-57 covered by the Second Protective Order are those portions of documents or data – or entire documents, if eligible in their entirety – that disclose one or more of the categories of highly competitively sensitive information covered by this Second Protective Order. To the extent that a Submitting Party believes that future submissions fall into one of these categories, the Submitting Party must file a letter explaining which category the information falls within, and the Submitting Party may file under this Second Protective Order only those documents specifically authorized by the Bureau.

“Outside Counsel of Record” or “Outside Counsel” means the firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in these proceedings, provided that such persons are not involved in competitive decision-making, *i.e.*, Outside Counsel’s activities, association, and relationship with a client do not involve advice about or participation in the business decisions of the client or of any competitor of a Submitting Party nor the analysis underlying the business decisions. Outside Counsel of Record includes any attorney representing a non-commercial party in these proceedings, provided that such a person is not involved in the competitive decision-making activities of any competitor of a Submitting Party.

“Outside Consultants” means consultants or experts retained for the purpose of assisting Counsel or a party in this proceeding, provided that the Outside Consultants are not involved in competitive decision-making, *i.e.*, Outside Consultants’ activities, association, and relationship with a client do not involve advice about or participation in the business decisions of the client or any competitor of a Submitting Party nor the analysis underlying the business decisions. Outside Consultants include any expert employed by a non-commercial party in these proceedings, provided that such a person is not involved in the competitive decision-making activities of any competitor of a Submitting Party.

“Reviewing Party” means a person who has obtained access to Highly Confidential Information (including Stamped Highly Confidential Documents) pursuant to paragraphs 9 and 12 of this Second Protective Order.

6. *Categories of Highly Confidential Information Covered by This Second Protective Order.* A document or a portion of a document may be submitted under the Second Protective Order only if it is responsive to one or the particular requests covered by this Order *and* it contains Highly Confidential Information as defined above. With regard to the Applicants’ requests, the Second Protective Order covers the documents and information sought by the following sections of the Information and Document Requests:

Documents responsive to Sirius and XM Request I.A, to the extent such agreements have not already been furnished to a government agency or Sirius and XM stockholders; Requests I.B.1 - 8; Requests II.B.1 - 2 to the extent the responsive information is proprietary and not otherwise been made public; Requests II.B.3 - 4; Requests II.D - I; Request III.B; Request III.C to the extent documents contain non-public sensitive technical or trade secret information regarding chipsets; Requests III.D - F; Request III.G, except for the coverage area maps; Requests IV.A - B; Requests IV.C.2 - 3; Requests IV.C.5 - 7; and Requests IV.D - G.

7. *Use of Highly Confidential Information.* Persons obtaining access to Highly Confidential Information (including Stamped Highly Confidential Documents) under this Second Protective Order shall use the information solely for the preparation and conduct of this license transfer proceeding before the Commission as delimited in this and subsequent paragraphs, and any judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including, without limitation, business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to the contents of any of the Stamped Highly Confidential Documents or Highly Confidential Information in its decision in this proceeding, it will do so by redacting any Highly Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Highly Confidential Information under this Second Protective Order.

8. *Non-Disclosure of Stamped Highly Confidential Information.* Except with the prior written consent of the Submitting Party, or as hereinafter provided under this Second Protective Order, neither a Stamped Highly Confidential Document nor any Highly Confidential Information may be disclosed further.

9. *Permissible Disclosure.* Subject to the requirements of paragraph 12, Stamped Highly Confidential Documents may be reviewed by Outside Counsel and Outside Consultants. Outside Counsel and Outside Consultants may disclose Stamped Highly Confidential Documents and other Highly Confidential Information to: (1) paralegals or other employees of such Outside Counsel or Outside Consultants not described in clause 2 of this paragraph assisting Outside Counsel or Outside Consultants in this proceeding; (2) employees of such Outside Counsel or Outside Consultants involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding; and (3) employees of third-party contractors performing one or more of the functions set forth in clause 2 of this paragraph. Reviewing Parties may discuss and share the contents of the Stamped Highly Confidential Documents and Highly Confidential Information with any other Reviewing Party and with the Commission and its staff. A Submitting Party's Stamped Highly Confidential Documents and Highly Confidential Information may also be disclosed to employees and Counsel of the Submitting Party.

10. *Protection of Stamped Highly Confidential Documents and Highly Confidential Information.* Persons described in paragraph 12 shall have the obligation to ensure that access to Stamped Highly Confidential Documents and Highly Confidential Information is strictly limited as prescribed in this Second Protective Order. Such persons shall further have the obligation to ensure that Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in this Second Protective Order.

11. *Prohibited Copying.* If, in the judgment of the Submitting Party, a document contains information so sensitive (even given its Highly Confidential designation) that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited" and no copies of such document, in any form, shall be made, subject to the provisions for access to information in electronic format in paragraph 13. Application for relief from this restriction against copying may be made to the Commission, with notice to Outside Counsel of Record for the Submitting Party.

12. *Procedures for Obtaining Access to Highly Confidential Documents.* In all cases where access to Stamped Highly Confidential Documents and Highly Confidential Information is permitted pursuant to paragraph 9, before reviewing or having access to any Stamped Highly Confidential Documents or Highly Confidential Information, each person seeking such access shall execute the

attached Acknowledgment of Confidentiality (“Acknowledgment”) and file it with the Bureau, on behalf of the Commission, and serve it upon each Submitting Party through its Outside Counsel of Record so that the Acknowledgment is received by each Submitting Party at least five business days prior to such person’s reviewing or having access to such Submitting Party’s Stamped Highly Confidential Documents or Highly Confidential Information, except that, where the person seeking access is one described in either clause 2 or 3 of paragraph 9, the Acknowledgment shall be delivered promptly prior to the person obtaining access. Each Submitting Party shall have an opportunity to object to the disclosure of Stamped Highly Confidential Documents to any such persons. Any objection must be filed at the Commission and served on Counsel representing, retaining or employing such person within three business days after receiving a copy of that person’s Acknowledgment (or where the person seeking access is one described in either clause 2 or 3 of paragraph 9, such objection shall be filed and served as promptly as practicable after receipt of the relevant Acknowledgment). Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Stamped Highly Confidential Documents or Highly Confidential Information. The Submitting Party shall make available for review the Stamped Highly Confidential Documents of such party at the offices of such party’s Outside Counsel of Record or, if the Submitting Party does not have Outside Counsel of Record, at the offices of such party’s in-house counsel; *provided, however*, that the Applicants shall make available for review all of their Stamped Highly Confidential Documents at the offices of one Applicant’s Outside Counsel of Record (the “Applicants’ Custodian Counsel”). Parties reviewing these documents will be provided the following alternatives: (1) parties will be provided adequate opportunity to inspect the documents on site; (2) parties may inspect the documents on site with the ability to request copies, at cost, of all or some of the documents; or (3) parties may request a complete set of the documents at cost, allowing two business days after the request is made for receipt of the copies. If a complete set of documents will be requested, parties are encouraged to make such requests at the time they submit the Acknowledgment. This will allow parties the opportunity to begin reviewing the documents at the end of the five-day period referred to above. All copies of documents that are removed from the Submitting Party’s office will be stamped as described herein and must be returned or destroyed in accordance with the terms of this Second Protective Order.

13. *Highly Confidential Information in Electronic Format.* If a party’s Outside Counsel or Outside Consultant has been granted access to Stamped Highly Confidential Documents and Highly Confidential Information pursuant to paragraphs 9 and 12, that Outside Counsel or Outside Consultant may request one copy of information contained, recorded, or electronically stored on a CD-ROM, DVD, flash drive, portable hard drive or similar electronic storage device. The disk or other medium containing Highly Confidential Information in electronic format shall be physically sent to the Outside Counsel or Outside Consultant; it shall not be transmitted electronically.

- a. A person in receipt of Highly Confidential Information in electronic format shall load the information onto a computer solely for the purpose of analysis in connection with this proceeding and for no other purpose. The original disk or other storage medium shall be stored in a secure location and a record kept of any persons given access to the disk. Only persons who have signed the Acknowledgement to this Second Protective Order may be given access to the disk.
- b. Once loaded onto a computer, the files containing Highly Confidential Information shall be password protected immediately. The password shall be given only to persons who have signed the Acknowledgement to this Order. The Highly Confidential Information may not be stored on a computer after being analyzed. After the analysis is complete, the results of such analysis may be stored by saving the results (but not the underlying Highly Confidential

Information) to a mobile data storage medium. All files containing Highly Confidential Information shall be deleted from the computer as soon as practicable.

14. *Requests for Additional Disclosure.* If any person requests disclosure of Highly Confidential Information outside the terms of this Second Protective Order, such a request will be treated in accordance with Sections 0.442 and 0.461 of the Commission's rules.

15. *Filings with the Commission.* Persons described in paragraph 9 may, in any documents that they file in this proceeding, reference Highly Confidential Information, but only if they comply with the following procedure: Two copies of each filing that contains or references Highly Confidential Information pursuant to this Second Protective Order (the "Confidential Filing") must be delivered in person to Jamila Bess Johnson, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. Filings containing Highly Confidential Information should not be submitted by email. For all hand deliveries pertaining to the Protective Order or this Second Protective Order, please contact Jamila Bess Johnson (202-418-2608) to schedule receipt of hand delivery, or in her absence, Vanessa Lemme (202-418-2611). The filing should be accompanied by a cover letter stating "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN MB DOCKET NO. 07-57." Each page of the confidential or proprietary document should be stamped "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN MB DOCKET NO. 07-57 before the Federal Communications Commission." In addition the submitting party must file with the Secretary's Office one copy of the Confidential Filing and two copies of the Confidential Filing in redacted form (the "Redacted Confidential Filing"). Each Redacted Confidential Filing shall have the same pagination as the Confidential Filing from which it is derived. The two copies of the Redacted Confidential Filing and their accompanying cover letters should be stamped "REDACTED – FOR PUBLIC INSPECTION." The cover letter accompanying the Redacted Confidential Filing should state that the Submitting Party is filing a redacted version of the particular Confidential Filing. Parties should not provide courtesy copies of filings containing Highly Confidential Information to Commission Staff unless the Bureau so requests, in which case the Submitting Party may print the number of copies that the Bureau requests. Any such courtesy copies shall be submitted under seal.

16. *Client Consultation.* Nothing in this Second Protective Order shall prevent or otherwise restrict Outside Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Highly Confidential Documents or Highly Confidential Information; *provided, however,* that in rendering such advice and otherwise communicating with such client, outside Counsel shall not disclose Stamped Highly Confidential Documents or Highly Confidential Information.

17. *No Waiver of Confidentiality.* Disclosure of Highly Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Highly Confidential Information. Reviewing parties, by viewing this material agree: (1) not to assert any such waiver; (2) not to use Highly Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Highly Confidential Information by a Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

18. *Subpoena by Courts, Departments or Agencies.* If a court, or a federal or state department or agency issues a subpoena or orders production of Stamped Highly Confidential Documents or Highly Confidential Information that a party has obtained under terms of this Second Protective Order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the

production or disclosure of any Stamped Highly Confidential Document or Highly Confidential Information.

19. *Violations of Second Protective Order.* Should a person that has properly obtained access to Highly Confidential Information under this Second Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Highly Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Second Protective Order, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Highly Confidential Information in this or any other Commission proceeding. Nothing in this Second Protective Order shall limit any other rights and remedies available to the Submitting Party at law or in equity against any person using Highly Confidential Information in a manner not authorized by this Second Protective Order.

20. *Termination of Proceeding.* The provisions of this Second Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, persons described by paragraph 9 shall destroy or return to the Submitting Party Stamped Highly Confidential Documents and all copies of the same. No material whatsoever derived from Stamped Highly Confidential Documents may be retained by any person having access thereto, except Outside Counsel (as described in paragraph 9 and 15) may retain, under the continuing strictures of this Second Protective Order, two copies of pleadings (one of which may be in electronic format) containing Highly Confidential Information prepared on behalf of that party. All Outside Counsel shall make certification of compliance herewith and shall deliver the same to Outside Counsel for the Submitting Party not more than three weeks after conclusion of this proceeding and any administrative or judicial review. The provisions of this paragraph regarding retention of Stamped Highly Confidential Documents and copies of same shall not be construed to apply to the Commission or its staff.

21. *Authority.* This Order is issued pursuant to Sections 4(i), 214(a) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214(a) and 310(d), Section 2 of the Cable Landing Act, 47 U.S.C. § 35, Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

APPENDIX A**Acknowledgment of Confidentiality****MB Docket No. 07-57**

I hereby acknowledge that I have received and read a copy of the foregoing Second Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Second Protective Order and that I shall not disclose or use Stamped Highly Confidential Documents or Highly Confidential Information except as allowed by the Second Protective Order. I acknowledge that a violation of the Second Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the Second Protective Order is due solely to my capacity as Outside Counsel or Outside Counsel of Record or Outside Consultant to a party or other person described in paragraph 9 of the foregoing Second Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Second Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in the Second Protective Order; and (2) Stamped Highly Confidential Documents are not duplicated except as specifically permitted by the terms of the Second Protective Order, and I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Highly Confidential Documents or Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Second Protective Order.

Executed at _____ this ____ day of _____, ____.

[Name]
[Position]
[Address]
[Telephone]
[Email]